

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

January 13, 2009

Elisabeth A. Shumaker
Clerk of Court

ELIZABETH MARIE ALEXANDER,

Plaintiff - Appellant,

v.

STATE OF NEW MEXICO
VOCATIONAL REHABILITATION;
GARY BEENE; SHIRLEY
GONZALES; LILY VEGA; THAD
BROWN,

Defendants - Appellees.

No. 08-2283
(D.C. No. 1:07-CV-00230-MCA-
KBM)

ORDER

Before **TACHA**, **MURPHY** and **McCONNELL**, Circuit Judges.

Plaintiff Elizabeth Marie Alexander appeals two interlocutory orders, one entered by the magistrate judge denying her motion for an appointment of counsel and another entered by the district court dismissing some of her claims and affording her a limited opportunity to amend her complaint. Neither a final order disposing of all claims against all parties nor a final judgment has been entered. The case actively continues in district court.

This court entered an order to show cause challenging the plaintiff to establish appellate jurisdiction. The plaintiff has not yet filed her response.

Upon further review, the court determined that it was unnecessary to wait for the plaintiff's response because it is beyond question that the orders being appealed are not final decisions and that this court lacks jurisdiction over the appeal.

With respect to the first order identified in the notice of appeal, orders entered by magistrate judges and not acted upon by the district court are generally not final and appealable. *See Phillips v. Beierwaltes*, 466 F.3d 1217, 1222 (10th Cir. 2006). Furthermore, an order denying an appointment of counsel, even if entered by a district court, is not a final decision or otherwise immediately appealable as of right. *Cotner v. Mason*, 657 F.2d 1390, 1392 (10th Cir. 1981).

As for the second order being appealed, the district court's order granting the defendants' motion to dismiss in part is not appealable at this time. This court has jurisdiction to review only final decisions, 28 U.S.C. § 1291, and specific types of interlocutory orders not present here. A final decision is one that disposes of all issues on the merits and leaves nothing for the court to do but execute the judgment. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996); *Atiya v. Salk Lake County*, 988 F.2d 1013, 1016 (10th Cir. 1993). Interlocutory orders such as the one here are not immediately appealable. *Manufacturers Cas. Ins. Co. v. Arapahoe Drilling Co.*, 267 F.2d 5, 6-7 (10th Cir. 1959) (stating that litigants may not seek piecemeal review of procedural incidents to lawsuit). After the case in the district court is brought to final judgment, the plaintiff must file a timely notice of appeal from that judgment if

she intends to appeal the final disposition and any previous interlocutory orders.

Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369, 1370-71 n.2 (10th Cir. 1979) (“An appeal from a final judgment draws into question all nonfinal orders preceding it.”).

Finally, the district court transferred to this court a document filed by the plaintiff captioned for the district court with the district court’s case number and titled Request for Continuance. Notwithstanding the pendency of this appeal, we do not believe that this document was intended for this court. We therefore transfer the plaintiff’s request for a continuance back to the district court for consideration. Even if the request was intended for filing here, however, it is moot in light of our dismissal of this premature appeal.

APPEAL DISMISSED.

Entered for the Court,
ELISABETH A. SHUMAKER, Clerk

A handwritten signature in cursive script that reads "Lara Smith".

by: Lara Smith
Counsel to the Clerk